JOINT TESTIMONY
OF THE
MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,
THE NATIONAL BASKETBALL PLAYERS ASSOCIATION,
THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION
AND
THE NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION
TO THE HOUSE JUDICIARY COMMITTEE
REGARDING HB 5964

August 18, 2010

Chairman Meadows and members of the Judiciary Committee, thank you for the opportunity to appear before you today to express our concerns regarding Michigan House Bill 5964 ("HB 5964").

Several individual athletes have testified regarding their serious concerns with the bill as currently drafted. Each of our individual player associations join them in expressing our strong opposition to the bill. This bill is not a codification of current Michigan common law regarding an individual's right of publicity. To the contrary, HB 5964 represents a major encroachment on an individual's right of publicity under current law.

Under the Michigan common law, the right of publicity is the right to protection from the appropriation of one's name or likeness for another's commercial advantage. Courts consider this right to be part of an individual's right to privacy. The Michigan common law has long recognized that "an individual has a right to privacy to be protected by the law of torts" and, as such, the Michigan courts "view invasion of privacy claims ... as being historically recognized as necessary to protect a right of highest importance." *Beaumont v Brown,* 65 Mich App 455, 460; 237 NW2d 501 (1975) rev on other grounds 401 Mich 80; 257 NW2d 522 (1977). This broad fundamental protection against an invasion of privacy would be drastically reduced if HB 5964 were enacted in its current form. HB 5964 proposes a statutory codification of the right of publicity which is far more restrictive than Michigan's common law and substantially diminishes an individual's right to protection from unauthorized commercial exploitation.

1. **The Michigan common law offers far-reaching protection to an individual's right of publicity.**

For many years, Michigan common law has recognized an individual's right of publicity and has protected an individual from the appropriation of his or her name or likeness for another's commercial advantage. *Pallas v Crowley, Milner & Co,* 322 Mich 411; 33 NW2d 911 (1948); *Carson v Here's Johnny Portable Toilets, Inc,* 698 F2d 831, 834 (6th Cir 1983). The

right of publicity, sometimes also referred to as the invasion of privacy cause of action for appropriation, is founded upon "the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others." *Battaglieri v Mackinac Center for Public Policy,* 261 Mich App 296, 300-301; 680 NW2d 915 (2004) (quoting Restatement, Torts 2d, §652C comments). As noted by the United States Court of Appeals for the Sixth Circuit,

> The theory of the right is that a celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity. *Id.*

Accordingly, the right of publicity prohibits the unauthorized commercial exploitation of a person that dilutes the value of his or her identity. *Herman Miller, Inc v Palazzetti Imports & Exports, Inc,* 270 F3d 298, 319-320 (6th Cir 2001) (quoting Restatement (Third) of Unfair Competition, §46 cmt c (1995)). As such, "**any unauthorized use** of a plaintiff's name or likeness, however inoffensive in itself, is actionable if that use results in a benefit to another." *Battaglieri v Mackinac Center for Public Policy,* 261 Mich App 296, 300-301; 680 NW2d 915 (2004) (quoting Restatement, Torts 2d, §652C comments) (Emphasis added). Based upon these principles, the Michigan Court of Appeals has found the right of publicity to be broad in scope. Moreover, under Michigan common law, "***all*** that a plaintiff must prove in a right of publicity action is (1) that he has a pecuniary interest in his identity, and (2) that his identity has been commercially exploited by the defendant." *Hauf v Life Extension Foundation,* 547 F Supp2d 771, 778 (WD Mich 2008); *Battaglieri v Mackinac Center for Public Policy,* 261 Mich App 296, 301; 680 NW2d 915 (2004).

2. The far-reaching protection of an individual's right of publicity would be drastically curtailed if HB 5964 were enacted in its current form.

HB 5964 proposes a statutory codification of the right of publicity which is much more limited than Michigan's common law and which allows for numerous unauthorized uses of a plaintiff's name or likeness in direct contradiction of the common law. As noted, under the Michigan common law, all that an individual must demonstrate to state a legally enforceable claim in a right of publicity lawsuit is an unauthorized use of his or her name or likeness that results in a benefit to another. While, under some circumstances, a defendant may be able to assert certain defenses to such actions (e.g., the First Amendment right to freedom of speech), the common law theory of liability for right of publicity is broad and "circumstances control each decision." *Pallas v Crowley, Milner & Co,* 322 Mich 411, 414; 33 NW2d 911 (1948). If HB 5964 were enacted, this expansive theory of liability would be destroyed and a court's decision would no longer be controlled by the circumstances of each case.

For example, unlike the common law, HB 5964 carves out numerous broad exceptions to the requirement that consent must be obtained prior to using another person's name or likeness for commercial advantage. Under Section 7(2) of HB 5964, consent is not required for the use of a personality's attributes in a long list of media including motion pictures, television programs, audiovisual works, documentaries, books, plays, graphic novels, radio or other audio programs, musical compositions, sound recordings, video games, original works of art, magazines,

newspapers, articles, newsletters, periodicals, sports broadcasts, editorials, and fictional works. Ultimately, after the lengthy list of exceptions, the only use for which HB 5964 clearly requires consent is an advertisement which falsely suggests an endorsement or sponsorship by a personality. However, an individual is already protected from false endorsements under Section 43 of the Federal Lanham Act, 15 *USC 1125.* Thus, the only commercial use for which HB 5964 explicitly requires consent is already protected by federal law. Further, as noted by the Sixth Circuit Court of Appeals, "the right of publicity isn't aimed at or limited to false endorsements; that what the Lanham Act is for." *Landham v Lewis Galoob Toys, Inc,* 227 F3d 619, 624 n1 (6th Cir 2000). The Court's statement in this regard is noteworthy. The highest court in the federal circuit that includes Michigan has expressly stated that the right of publicity is not limited to just protection from advertisers falsely suggesting that a person endorses or sponsors a product, good, or service that the person has not endorsed or sponsored. Yet, HB 5964 would, if enacted, limit the right of publicity to just such claims, in direct contravention of the common law.

Additionally, while it is true that at times the use of a person's name or likeness in HB 5964's excepted media are protected by the First Amendment as items of newsworthy or legitimate public concern, the application of the First Amendment "depends on the character of the publication," and is a determination that is made by the court as a matter of law. *Battaglieri,* 680 NW2d at 919. As such, there are circumstances under which the use of a personality's attributes in a video game, musical composition, photograph, radio program, or newsletter for commercial purposes would not fall under the realm of the First Amendment and would invade an individual's right of publicity under the common law. The passage of HB 5964, however, would eliminate an individual's current ability to protect his or her rights under those circumstances. The following cases illustrate this point:

- In *Parks v LaFace Records,* 329 F3d 437 (6th Cir 2003), Rosa Parks was able to establish a right of publicity claim under Michigan's common law against musical group OutKast and its record producers and distributors for using her name as the title of a profane song. If HB 5964 had been the law, she would have lost her protection because of HB 5964 Section 7(2)(a).

- In *Carson v Here's Johnny Portable Toilets, Inc,* 698 F2d 831 (6th Cir 1983), Johnny Carson prevailed against individuals selling "Here's Johnny" portable toilets without his consent on the grounds that the phrase "Here's Johnny" violated his publicity rights. Had HB 5964 been the law in 1983, Johnny Carson would not have prevailed. Both Section 7(4) and Section 3(a) would have stripped Johnny Carson of any protection.

- In *Hauf v Life Extension Foundation,* 547 F Supp2d 771 (WD Mich 2008), a cancer survivor mother's allegations were sufficient to state a right of publicity claim against a foundation for publishing a cancer recovery story in its membership drive campaign materials under Michigan common law.[1] If HB 5964 had been the law, the plaintiff's right of publicity claim would have been dismissed under Section 7(2)(d).

[1] However, ultimately the Court granted the defendants' motion for summary judgment because the plaintiff had previously expressly consented to the defendants' use of the name, likeness, and

- In *Pallas v Crowley, Milner & Co,* 322 Mich 411; 33 NW2d 911 (1948), the Michigan Supreme Court recognized that an individual may base a claim for damages on the defendant's unauthorized use of her photograph to advertise makeup. The Court recognized "a fundamental difference between the use of a person's photographic likeness in connection with or as part of a legitimate news item in a newspaper, and its commercial use in an advertisement for the pecuniary gain of the user." *Id.* at 417. While ultimately the Court found in favor of the defendant because the plaintiff was a model who consented to her photograph being taken by the photographer with whom she was registered as a model[2], the plaintiff would not have even had a legally enforceable right if HB 5964 had been the law because Section 7(c) would have barred her claim.

- In *Zacchini v Scripps-Howard Broadcasting Co,* 433 US 562; 97 SCt 2849 (1977), the United States Supreme Court held that the First Amendment did not insulate a broadcasting company from liability for violating the plaintiff's right of publicity under circumstances where the defendant published the plaintiff's entire human cannonball act with favorable commentary on television without the plaintiff's consent. HB 5964 Section 7(a) would insulate a broadcasting company from such liability and allow commercial exploitation far beyond the scope of the First Amendment.

- In *Neal v Electronic Arts, Inc,* 374 F Supp2d 574 (WD Mich 2005), a football player brought suit against a video game producer alleging invasion of privacy by appropriation based on the defendant's use of his likeness in a video game. The Court, construing Tennessee law, eventually found in favor of the defendant on a motion for summary judgment because the plaintiff had previously signed a consent form giving another organization the right to use his name and that organization had granted the defendant a license to use the plaintiff's name and likeness. However, if HB 5964 had been the law, no consent would have been necessary and anyone would have had the unfettered right to sell video games exploiting the player's name and reputation without any recognition of the player's right to protect his own interests.

As these examples reveal, the passage of HB 5964 would substantially curtail an individual's current right to protection from unauthorized commercial exploitation.

3. If HB 5964 becomes law, then Michigan will offer the least protection to an individual's right of publicity of any of the four Sixth Circuit states.

The United States Court of Appeals for the Sixth Circuit is the federal appeals court that hears federal cases from Michigan, Ohio, Kentucky and Tennessee. Because these four states are in the same federal circuit, it is enlightening to compare the laws of those states with respect to the right of publicity. Such comparison show that, if HB 5964 were to be enacted in its

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testimonials in a written waiver agreement. *Hauf v Life Extension Foundation,* 640 F Supp2d 901, 906 (WD Mich 2009).

[2] *See Pallas v Crowley-Milner & Co,* 334 Mich 282; 54 NW2d 595 (1952).

current form, Michigan would become the Sixth Circuit state offering the least protection to an individual's right of publicity. The bill would drastically curtail an individual's right of publicity to a greater extent than any of the other three states within the jurisdiction of Sixth Circuit. A review of provisions from the statutes of the other Sixth Circuit states will demonstrate this point:

- Kentucky's statute "recognizes that a person has property rights in his name and likeness which are entitled to protection from commercial exploitation" and extends those rights, if a person is a public figure, for a period of 50 years from the date of a public figure's death. *KSA s. 391.170.* The Kentucky statute does not codify any exceptions to an individual's right of publicity. *Id.*

- Tennessee's statute generally provides, "every individual has a property right in the use of that person's name, photograph, or likeness in any medium in any manner." *TC 47-25-1103.* The Tennessee statute prohibits the unauthorized use of another individual's name, photograph, or likeness in any medium "as an item of commerce for purposes of advertising products, merchandise, goods, or services, or for purposes of fund raising, solicitation of donations, purchases of products, merchandise, good or services." *TC 47-25-1105.* Tennessee provides only extremely limited statutory exemptions from this general rule "if the use of a name, photograph, or likeness is in connection with any news, public affairs, or sports broadcast or account." *TC 47-25-1107.*

- Ohio's statute generally provides that "a person shall not use any aspect of an individual's persona for a commercial purpose" without the person's written consent. *ORC 2741.02.* The Ohio statute defines "persona" as "an individual's name, voice, signature, photograph, image, likeness, or distinctive appearance". *ORC 2741.01(A).* This definition is broader than HB 5964's definition of "attribute" which is defined as "an individual's name, voice, signature, image, or likeness." Additionally, whereas HB 5964 excepts original works of art, the Ohio statute only excepts original works of <u>fine</u> art. *ORC 2714.09.* While the Ohio statute does contain a list of exceptions that restricts an individual's publicity rights more than the statutes in Kentucky or Tennessee, the Ohio Act is not as restrictive as HB 5964.

- Unlike HB 5964, none of the laws in other Sixth Circuit states list video games as a category of protected "media" that is free to exploit a person's name and reputation for commercial purposes without consent.

Ultimately, the passage of HB 5964 in its present form would curtail the right to publicity and restrict an individual's ability to file claims which the courts have "recognized as necessary to protect a right of highest importance." *Beaumont v Brown, supra.* As currently drafted, HB 5964 does not preserve an individual's existing right to be free from the unauthorized commercial exploitation of his or her identity. To the contrary, HB 5964 represents a major curtailment of that right. Therefore, on behalf of all four of our associations, we respectfully encourage you to reject HB 5964 .

Thank you.

Kentucky Statute

391.170 Commercial rights to use of names and likenesses of public figures.

(1) The General Assembly recognizes that a person has property rights in his name and likeness which are entitled to protection from commercial exploitation. The General Assembly further recognizes that although the traditional right of privacy terminates upon death of the person asserting it, the right of publicity, which is a right of protection from appropriation of some element of an individual's personality for commercial exploitation, does not terminate upon death.

(2) The name or likeness of a person who is a public figure shall not be used for commercial profit for a period of fifty (50) years from the date of his death without the written consent of the executor or administrator of his estate.

Effective: July 13, 1984

History: Created 1984 Ky. Acts ch. 263, sec. 1, effective July 13, 1984.